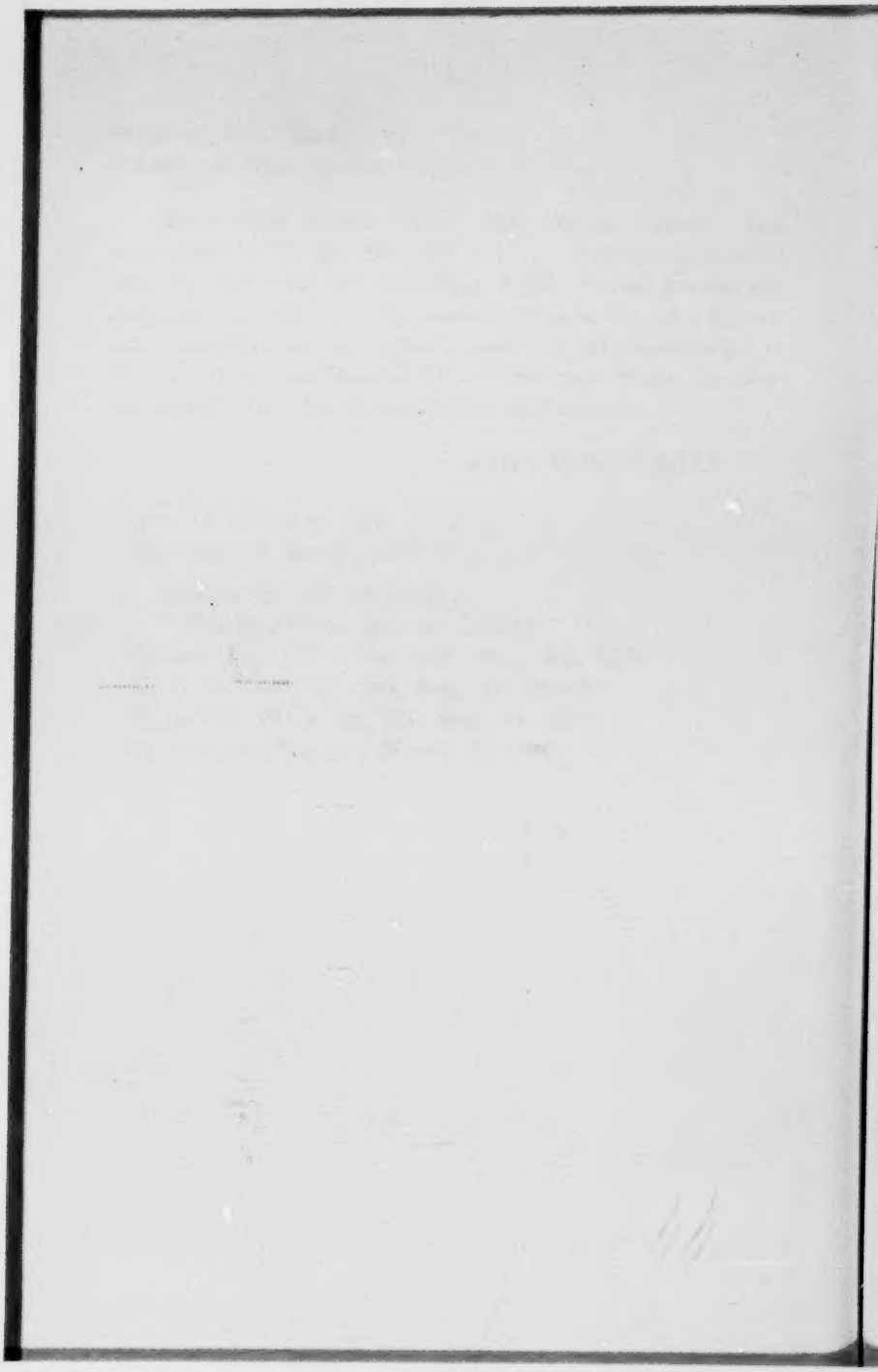

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The decision of the State Industrial Board of the State of New York appears in the Record at page 15; and the Conclusions of Fact and the Ruling of Law of the State Industrial Board appear in the Record at pages 3-4; and are not elsewhere reported.

The decision of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported in 259 App. Div. 942 and appears in the Record at page 72.

The opinion of the Court of Appeals of the State of New York is reported in 284 N. Y. 481 and appears in the Record at pages 76-78.

Argument

POINT I.

The decision of the Court of Appeals is contrary to the applicable decisions of the United States Supreme Court and is in conflict with those of the lower United States Courts, and is contrary to the General Maritime Law as developed by the United States Supreme Court.

A.

The Decision Is Contrary to the Applicable Decisions of This Court Regarding Stevedores.

The law is firmly established by this Court that a stevedore's work is of a maritime nature. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. It is settled that if a stevedore is injured on board a vessel in navigable waters, his case comes within Federal or Admiralty jurisdiction and cannot come within State jurisdiction. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. Dimino's work, like that of a stevedore had to do with the unloading of ships in navigable waters (R. 43-45, 55, 57). Dimino ordered the number of stevedores needed to unload a ship (R. 33); he told the stevedores when to begin unloading the ship (R. 45, 55, 57) and gave them the order in which to open and unload the hatches (R. 37, 60) and the order in which to remove newsprint rolls from the ship (R. 55, 57); and he would instruct the stevedores to change the manner of unloading, when-

ever he received any changes in orders for newsprint rolls (R. 37). In the course of his duties, he was frequently compelled to go on ships to ascertain the cause of any delay in the unloading thereof (R. 48, 49, 61) and to locate various newsprint rolls in the hatches, to see what rolls were in a position to be unloaded next and to ascertain what rolls were still on the ship (R. 36, 50, 52). In performing these duties on the ship, Dimino secured information which enabled him to determine what directions to give the head stevedore as to the order of unloading the ship. As his work was largely concerned with the unloading of a ship in navigable waters, it was of a maritime nature. Since Dimino was fatally injured on a ship in navigable waters while doing work of a maritime nature which facilitated the unloading of said ship (R. 50), his case comes within Federal or Admiralty jurisdiction.

B.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts Which Hold That the Fact That Part of an Employee's Duties Are on Land Does Not Prevent His Work From Being Maritime in Nature.

Although a stevedore's work may be entirely or partly on land, it is well settled that his employment is maritime in nature. If he is injured on land, his case comes under State jurisdiction. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263. If he is injured on a ship in navigable waters, his case comes under Federal jurisdiction. *Southern Pacific Co.* v. *Jensen*, supra. Although part of Dimino's duties were on land, he was injured on board a ship in navigable waters while in the course of his maritime duties connected with the

unloading of said ship and thus his case comes under Federal jurisdiction.

> "The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."
>
> *Northern Coal & Dock Company* v. *Strand*, 278 U. S. 142, 144.

In *Norton* v. *Gulf Refining Co.*, 94 Fed. (2d) 380, certiorari denied, 304 U. S. 566, McLane was a land employee who worked in a pumphouse on the shore. He was sent to a gasoline barge with bottles to be filled with sample gasoline out of each compartment of the barge, and the samples were to be taken to the laboratory for a test. He was killed by an explosion while on the barge. The Court held that his case came under the Longshoremen's and Harbor Workers' Act, since he was engaged in work of a maritime nature at the time of his death.

See also,

Merchants' & Miners' Transp. Co. v. *Norton*, 32 Fed. (2d) 513;

Employers' Liability Assurance Corp. v. *Cook*, 281 U. S. 233, 236.

C.

The Decision Is Contrary to the Applicable Decisions of This Court and of the Lower United States Courts, in Holding That Dimino's Work Was a Matter of Local Concern.

The fact that Dimino's duties obliged him to be on the pier and aboard vessels which arrived at said

pier in New York City, does not make his contract one of local concern. It is well settled that a stevedore, whose duties are performed on a dock and on a vessel moored at said dock, and who does not go out of the locality, is not engaged in work of merely local concern. The newsprint rolls had been transported by ship from Maine to New York City, where they were destined to go to various newspaper offices in New York City and in cities in New Jersey. Thus the transportation of these rolls was interstate in character and clearly not of local concern. Dimino's work in supervising the unloading of the vessel and facilitating the transportation of the newsprint rolls from the vessel to the newspaper offices was an essential part of the interstate transportation, and, therefore, was not merely of local concern.

> "The unloading of a ship is not a matter of purely local concern as we have often pointed out."
>
> *Employers' Liability Assurance Corp.* v. *Cook*, supra, at p. 236;
>
> *Northern Coal & Dock Company* v. *Strand*, supra, at p. 144;
>
> *Martinson* v. *State Industrial Accident Commission*, 60 Pacific (2d) 972, 973, 154 Or. 42, certiorari denied, 300 U. S. 659;
>
> *United States Fidelity & Guaranty Co.* v. *Lawson*, 15 Fed. Supp. 116, 122.

D.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts, in Holding that Dimino's Work Bore No Relation to Navigation and Was Not Maritime in Nature.

Dimino's work was closely connected with the commerce in which the ship was engaged. It was his duty to see that the newspaper companies were adequately supplied with newsprint rolls (R. 33). To do this he ordered the stevedores to unload the hatches in such wise that the consignees of the paper rolls would best be satisfied (R. 37, 60). He assisted the ship in performing its functions as a carrier, and his work enabled the ship quickly to discharge its cargo for transportation to the consignees. His duties had a direct relation to commerce and were maritime in nature.

> "Such services so rendered to facilitate the performance by a ship of her duties as a carrier have a direct relation to navigation and commerce and are maritime in their nature."
>
> *Moss Tie Company, et al.* v. *Tanner, et al.*, 44 Fed. (2d) 928, 930;
>
> *Northern Coal & Dock Company* v. *Strand*, supra, at p. 144;
>
> *Martinson* v. *State Industrial Accident Commission*, supra, at p. 973;
>
> *Robinson* v. *The C. Vanderbilt*, 86 Fed. 785, 789.

The Referee at the hearing of the case was firmly convinced that Dimino's work was of a maritime character

(R. 52-54). It should be noted that the Court of Appeals stated that "said work bore no relation to *navigation*" (R. 78). It is noteworthy that the Court failed to state that the work bore no relation to *commerce*. At the hearing of the case, the Referee was of the opinion that Dimino's work had a direct relation to commerce, since he assisted in the work of transporting newsprint rolls from the hatches of the ship to the consignees (R. 52).

The case at bar is distinguishable from *P. J. Carlin Construction Co., et al.* v. *Edward Heaney, et al.*, 299 U. S. 41, where a bricklayer was injured while being transported on a boat to an island where he was to work in the erection of a building. His employment did not require any work on navigable waters or work that was connected with navigation or commerce. A case similar to the *Heaney* case and arising out of the same accident is *Matter of Dingfeldt* v. *Albee Godfrey Whale Creek Co.*, 272 N. Y. 623, certiorari denied, 301 U. S. 687.

The decision in the case at bar is in violation of Article I, Section 8 and Article III, Section 2, of the *Constitution of the United States of America* and of the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A., Sec. 903, (a).

E.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts, in That It Relied Partly on Grant Smith-Porter Co. v. Rhode, Which Is Distinguishable.

The Court of Appeals relied for its decision partly on *Grant Smith-Porter Co.* v. *Rhode*, 257 U. S. 469, in which a carpenter was employed on a partially completed vessel lying at dock in a navigable stream. In that

case the Court properly held that the work of constructing a vessel is non-maritime and that the State had jurisdiction. The vessel was not completely built and it was not as yet in navigation or commerce. Furthermore, the Oregon Statute was not compulsory but elective, and the employer and employee had elected to submit to its provisions.

In *John Baizley Iron Works* v. *Span*, 281 U. S. 222, where an employee was injured while repairing a completed ship tied up at a pier in the Delaware River, the Court held that repairing a completed ship in navigable waters was directly connected with navigation and commerce, and said (pp. 230-1):

> "In *Grant Smith-Porter Co.* v. *Rhode*, supra, claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation and which had not become an instrumentality of commerce."

Since Dimino was injured while performing work of a maritime nature on board a completed vessel in navigable waters, which was engaged in navigation and commerce, this case comes under the Longshoremen's and Harbor Workers' Compensation Act.

Matter of Doey v. *Howland Co.*, 224 N. Y. 30, certiorari denied, 248 U. S. 574;

Union Oil Co. v. *Pillsbury*, 63 Fed. (2d) 925;

Puget Sound Nav. Co., et al. v. *Marshall*, 31 Fed. Supp. 903 (U. S. District Court, W. D., Washington, N. D., Feb. 8, 1940).

F.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts, in That It Relied Partly on Miller's Indemnity Underwriters v. Braud, Which Is Distinguishable.

In its decision, the Court of Appeals relied partly on *Miller's Indemnity Underwriters* v. *Braud,* 270 U. S. 59, in which a diver was suffocated while engaged in cutting timbers under water from an abandoned state of way. The Court held that the State had jurisdiction. The diver was not engaged in navigation or commerce, which fact is pointed out by this Court in *John Baizley Iron Works* v. *Span,* supra, at p. 231:

> "In *Miller's Indemnity Underwriters* v. *Braud,* 270 U. S. 59, the decedent met his death while cutting off piles driven into the land under navigable water. This had only remote relation to navigation or commerce."

Furthermore, the diver was not "upon navigable waters", within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and he was working under water on land belonging to the State, as was pointed out in the case of *Merchants' & Miners' Transp. Co.* v. *Norton,* supra, at page 515:

> "In the Braud Case, for illustration (in which the state law statute was held to be applicable) the locality of the happening was not, in the words of the Act of Congress 'upon navigable waters'. The decedent was at the time at the work of sawing off timbers which were (although under water) on land belonging to the state."

G.

The Decision Is Contrary to the Applicable Decisions of This Court and the Lower United States Courts, in That It Relied Partly on Rosengrant v. Havard, Which Is Distinguishable.

The Court of Appeals relied partly for its decision on the case of *Rosengrant* v. *Havard,* 273 U. S. 664, in which deceased was employed as a lumber inspector, checker and grader, whose duties were to grade and tally lumber which was being removed from barges into the planing mill of his employer. He was standing on a moored vessel checking lumber being unloaded from a barge alongside, when he was injured. The Court held that the State had jurisdiction. The basis of the Court's decision in the *Rosengrant* case was pointed out in the decision of *Norton* v. *Gulf Refining Co.,* supra, where the Court distinguished the *Rosengrant* case as follows (p. 381):

> "In that case Rosengrant was a lumber checker, employed by a company which had a lumber yard, and his checking of the lumber could as well have been done on shore after the lumber left the vessel. There was no necessity for his going on the barge."

It should also be noted that at the time Rosengrant was injured, he was standing on a moored vessel, but not on the barge which was being unloaded. His work had nothing to do with the vessel on which he was standing. Since he could have checked and graded the lumber on the shore just as well, and since he had no duties which necessitated his going on the barge, nor any duties connected with the unloading of the vessel, his work was not of a maritime nature.

Another case which shows the distinction between the case at bar and the *Rosengrant* case is *Moss Tie Company, et al.* v. *Tanner, et al.*, supra, in which Tanner was employed to stencil marks on cross-ties which had been transported on a barge to the side of a steamer. He was on the barge marking the cross-ties, which were then loaded from the barge to the steamer by stevedores. The Court held that Tanner was entitled to Federal Compensation as a maritime employee.

The case at bar is distinguishable from the *Rosengrant* case, since Dimino's duties required him to go frequently on board the ships to look into the hatchways, whenever there was a delay in unloading, to ascertain the location of the various rolls in the hatches, to see what rolls were in position to be unloaded next and what rolls were still on the ship. Such work could only have been done on shipboard. His duties were closely connected with the unloading of the ship, as he ordered the necessary number of stevedores and gave them instructions as to the manner and order of unloading the ship.

II.

There Is No Evidence to Support the Finding of Fact of the Court of Appeals to the Effect That There Is Nothing in the Record to Show That the Information Sought by Dimino Upon the Ship Was Not Available on Shore.

The Court of Appeals made the following finding of fact: "There is nothing in the Record to show that the information sought by Dimino upon the ship was not available on shore" (R. 77). Said finding of fact is contrary to the finding of fact of the State Industrial Board in its decision (R. 15), which states in part:

> "Apparently due to uncertainty as to amount and location of certain size rolls remaining on board ship, decedent found it necessary to board such ship for personal inquiry and investigation. There is nothing to indicate his knowledge could be conclusively secured otherwise. In conducting such inquiry he fell into a partly closed hatchway. The record indicates it was not unusual for him to have to board vessel for similar purpose and that there was no prohibition on such practice" (R. 15).

In fact, in its own decision the Court of Appeals admits that Dimino did have to go on board the ship:

> "Mr. Dimino frequently was *obliged* to get on board of ship, whenever there was a delay in unloading; he always went on board to find out cause of the delay. He often went on the ship to find out where the different newsprint rolls were and also what their position in the hatches were so he could see where the rolls could be unloaded best" (R. 77).

The word, "obliged", used by the Court of Appeals, shows that it was necessary for Dimino to go on board the ship.

The Record is without evidence to support the finding of fact of the Court of Appeals. In fact, the Record clearly shows that Dimino had to go on board the ship to secure the information he desired.

Frederick Grenvich, a witness for Respondent, in describing the accident, stated (R. 50):

> "A. I was getting relief at that moment and

he (Dimino) was talking to the stevedore on the dock about how many rolls were left on the ship of a certain size, Long Island Star. He wanted to know how many were left on the ship.

A. (Cont'g:) The stevedore looked at the plans and both looked at the plan and did not get an exact answer, and told him to walk over and go on the ship. We went on the ship and looked for the hatch boss, and he asked him where the rolls were situated, these particular rolls. So the hatch boss come with us and the hatch was covered and we went through the opening where you go down into the hole of a ship, down a ladder, and the only light we got there was just from the manhole and a little opening you let your body through. We lit matches and we counted the rolls roughly, a rough guess. And then he asked the hatch boss where the rest were, and he told him they were across the hatchway. We were warned that the hatch was open when we went down there and we went looking for the opening and when we went where we thought the hatch opening would be, it was closed, we found the covers on,—and he said at that time 'Let us go, the hatches are closed.' And we went walking across and he just walked into the open hatch" (R. 50).

It is a reasonable inference that Dimino would not have gone to all the trouble of searching through the dark hatchways of the ship for missing rolls, if he could have secured the information on shore.

Ralph Hill, a witness for Respondent, testified:

"Q. So that if there were mixed rolls, two different sizes, say halves and three-quarters, would

you be able to tell from looking at the plans, which was in the front and which was in the rear? A. No, I could not" (R. 35-36).

Frederick Schanches, a witness for Respondent, testified that if the newsprint rolls on the ship were of different sizes, there were three ways in which Dimino could learn their location and which rolls were available first for unloading: (1) by asking the first officer on the boat; (2) If the first officer did not know, by asking the stevedore; (3) If the stevedore did not know, by Dimino's going on the boat to look for himself (R. 61). Schanches also testified that if there was a delay in the removal of paper, Dimino "might have occasion to go on board" to make an investigation as to the cause of the delay (R. 61).

Gus Monnone, chief stevedore, a witness for Respondent, testified:

> "Q. And if Mr. Dimino wanted to give those orders, he had to go on the ship to see you? A. Sometimes. Sometimes he came and see. Sometimes I would be low down and they go on themselves" (R. 57).

Frederick Grenvich also testified that he frequently saw Dimino on the ships; that whenever there was a delay, Dimino would be at a hatchway looking down into it; and that he would confer with the mate of the ship when there was a delay (R. 48, 49).

In fact, Respondent's attorney conceded that Dimino had to go on the boat in the course of his duties to secure the information he needed:

> "Mr. Gardiner: The materiality is this man could not perform his duties unless he knew the condition of these hatches in the tiers; in order

to promise delivery he would have to get on the boat to see for himself. There was no one else to tell him. The ship's plan did not tell him. As this witness said, he cannot tell and neither could his boss, Joseph Dimino tell. He had to go on the ship to find out and if he did not, he had to ask some one else to go" (R. 36).

"Mr. Gardiner: * * * His services, you might even go so far as to say are incidental but I do not. I go further to say it was absolutely necessary for him to go on the boat. He could not perform his task, could not tell the paper companies when he could get the rolls until he knew exactly how the situation stood. He also had to know the cause for the delay in unloading that boat so that he could instruct his men what to do" (R. 52).

Mr. Gardiner: * * * But Mr. Dimino had to go on the boat. He had to know the exact location" (R. 52).

A Federal right of the Petitioner has been denied as a result of the above finding of fact of the Court of Appeals which is shown by the Record to be without evidence to support it. The conclusions of law depriving Petitioner of said Federal right and the above finding of fact are so intermingled as to make it necessary for this Court to analyze the facts, in order to pass upon the Federal question.

Creswill v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261;

Truax v. *Corrigan*, 257 U. S. 312;

Chicago, M. & St. P. Ry. Co. v. *Coogan*, 271 U. S. 472.

I.

There Is No Evidence to Support the Finding of Fact of the Court of Appeals to the Effect That Dimino Had No Direct Supervision of the Stevedores.

The Court of Appeals found that Dimino had no direct supervision or control of the stevedores (R. 77). The Record is without evidence to support said finding. In fact, the uncontradicted testimony in the Record is to the effect that Dimino gave the stevedores instructions as to when to start to unload the ship, and as to the order of unloading the hatches and the order in which various rolls were to be taken from the ship. That Dimino had supervision of the stevedores is shown by the following testimony.

Ralph Hill, a witness for Respondent, testified:

> "Q. Would you say he did not have anything to do with it? Did he have anything to say which particular order was to come out first or the order in which the shipment was to come out? A. Yes, he gave them the necessary information; he gave the stevedores the necessary information eight o'clock in the morning.
>
> Q. Well, to that extent he did have some supervision over the unloading? A. Well, he did, yes, sir" (R. 42-43).

> "A. * * * I know Dimino spoke to the stevedores, and told them just what hatches to open up and which ones to work * * *" (R. 37).

> "Q. If there were any telephonic orders, Mr. Dimino would instruct the stevedores, is not that right?
>
> * * * * * * * * * *

A. That is right" (R. 37).

"Q. But his duties were to instruct the head stevedore? A. That is right.

Q. He could tell him what hatches to open? A. That is right" (R. 40).

"Q. And the ship was unloaded under the instructions of Mr. Dimino? A. Yes, sir" (R. 44).

"Q. Would the stevedores or the men on the boat handle any of the merchandise on the boat until they were given orders to do so by Mr. Dimino? A. Mr. Dimino gave the orders to the stevedore, who was in charge of the men on the boat.

Q. I understand. The source of all the unloading, the information as to where it was to go and what it was that was to be done— A. Came from Mr. Dimino" (R. 45).

* * * * * * * * *

"Q. What you mean to say is that insofar as the physical part of removing the merchandise, Mr. Dimino had nothing whatsoever to do with that? A. No, sir.

Q. But he did give the instructions, the oral instructions to the stevedore? A. That is right.

Q. Not as to how they were to do it but just what work they were to do? A. Right" (R. 45).

Gus Monnone, the chief stevedore, a witness for Respondent, testified:

"Q. Now, on the date Mr. Dimino was injured, did he direct you as to what rolls he wanted taken off the ship? A. First thing in the morning" (R. 55).

"A. * * * I get the orders from him every morning anytime there is paper and there is such a kind of paper, I give it to him" (R. 57).

"Q. After Mr. Dimino gave you your orders in the morning did you go board the ship? A. I go on board the ship, every ship.

Q. After you got your orders? A. That is my duty" (R. 57).

Frederick Schanches, a witness for Respondent, testified that Dimino's first duty was to instruct the head stevedore as to which hatches he intended to work first (R. 60).

This Court in its discretion should review said finding of fact, since there was no evidence to support it and it resulted in the denial of a Federal right of Petitioner's. Said finding of fact is so intermingled with the conclusion of law of the Court of Appeals denying a Federal right to Petitioner, that it is necessary for this Court to analyze said facts for the purpose of passing upon the Federal question involved.

The decision of the Court of Appeals will cause future uncertainty on the question presented by this case, as it is out of harmony with the sound principles of maritime law established by this Court. Since the judgment of the Court of Appeals is contrary to the applicable decisions of this Court and is in conflict with the decisions of the lower United States Courts, it is respectfully submitted that this Court should issue a Writ of Certiorari to review said judgment.

POINT II.

The Court of Appeals has decided a Federal question of substance not heretofore determined by this Court.

This Court has not heretofore settled the status of Pier Superintendents, with duties requiring them to order the number of stevedores needed to unload ships and to instruct stevedores as to the manner and order of unloading said ships in navigable waters, and who are injured while on one of said ships in the performance of their duties, which require them to go on board said ship, and which are connected with and facilitate the unloading of said ship. In its decision the Court of Appeals has decided an important Federal question not heretofore determined by this Court. That the question is a puzzling one is shown by the fact that the Appellate Division of the Supreme Court rendered a four-to-one decision in favor of the Petitioner (R. 72), while the Court of Appeals rendered a five-to-two decision in favor of the Respondents (R. 76-78). The Presiding Justice of the former Court and the Chief Judge of the latter Court both decided in favor of the Petitioner (R. 72, 78).

This question should be finally settled by this Court, due to the fact that it is of great nationwide concern. Such final determination by this Court is of the utmost importance to those who operate piers throughout the country. The decision by this Court will settle the law as to such Pier Superintendents and other dock workers with similar duties, not only in New York City, but also in all parts of the United States, and will save much future litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN ROSS LAUER,
Attorney for Petitioner,
44 Whitehall Street,
New York City.

JOHN ROSS LAUER,
Of Counsel.

DAVID J. MOUNTAN, JR.,
With Him on the Brief.